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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-497

THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

THE CHEROKEE NATION, THE CHOCTAW NATION,
and THE CHICKASAW NATION,
Respondents.

THE BRIEF OF THE CHOCTAW NATION AND THE CHICKASAW NATION IN OPPOSITION TO THE STATE OF OKLAHOMA'S PETITION FOR A WRIT OF CERTIORARI

May It Please the Court:

The arguments advanced by the State of Oklahoma in its petition for a writ of certiorari have no significance unless there is merit to its preliminary statement which argues that in its decision in this case this Court did not decide the present ownership of the navigable portion of the bed of the Arkansas River in Oklahoma. To put it in another way, the State now takes the position that in its decision the only thing this Court decided was who owned the bed of the river in 1830 and 1835; that out of all the extensive research of the parties, the hundreds of pages of

briefs, the arguments which extended over two days in October of 1971 and the reargument last March, and the labors of this Court in reaching a decision, there came only a determination of a question of historic interest which had no relevance to the *raison d'etre* of this lawsuit.

> "For the proper construction of the decree under consideration, regard is to be had to the issues before the court on appeal, the findings applied for and the directions given.[1]
>
> "As the opinion does not always state all that was decided, and sometimes contains broad expressions, it should be read in the light of what was necessarily involved and under consideration, without giving its language a strained construction."[2]

To determine ". . . the issues before the court on appeals and the findings applied for . . ."[1] *supra*, a quick reference to the postures assumed by the parties in their pleadings and in their briefs, will be helpful.

In its complaint the Cherokee Nation said:

> "VI. That on April 26, 1908, pursuant to the provisions of Section 27 of an Act of Congress of that date (34 Stat. 137), fee title to the said river bed lands described herein, 'as lands belonging to the Cherokee Tribe', passed to and became vested in the United States of America in Trust for the use and benefit of the members of said Cherokee Nation or Tribe, and their respective heirs, and that said Trust title exists today undiminished and unextinguished."

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[1] *Kansas City Southern Railway Co.* v. *Guardian Trust Co.*, 281 U.S. 1, 10. Last paragraph, second column 74 L.Ed. 659 at page 667.

[2] First paragraph, first column, 5B C.J.S. 542.

The Cherokees also alleged that the State had collected large sums of money from leases on the river bed and it prayed for:

> "VII. . . . judgment against the said corporate and other defendants requiring them to pay all future royalties derived from their respective leases to the United States of America as Trustee . . . and an order restraining each and every defendant from interfering in any manner or form after final judgment herein with the rights of either the United States or the said Cherokee Nation . . . in their peaceful possession and lawful use of the said property."

In its Counter Claim the State prayed:

> ". . . that plaintiff take nothing by reason of its complaint and that this defendant by reason of its Counter Claim have judgment herein quieting its title to the bed of the Arkansas River as described in the Complaint, and for the possession thereof and for such other and further relief as the Court may deem just and proper."

In this Counter Claim in this action the Humble Oil and Refining Company prayed:

> ". . . that plaintiff take nothing by reason of its Complaint and that this Defendant by reason of its Counter Claim have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in the Complaint, insofar as such bed lies within the above described sections. . . ."

Likewise in this Counter Claim in this action the Marathon Oil Company prayed:

> ". . . that plaintiff take nothing by its Complaint and that this defendant, by reason of its Counter Claim,

have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in said Complaint insofar as said bed lies within Section 35, Township 10 North, Range 25 East, State of Oklahoma, and insofar as plaintiff's complaint might cloud its title to other interests in land which it may own in the lands described in Plaintiff's Complaint lying within the State of Oklahoma, and for quiet and peaceful possession thereof."

In their answer and reply in this action the Choctaw Nation and the Chickasaw Nation prayed:

". . . that the full, legal and equitable title in and to the said real property be quieted and confirmed in them and that the other parties to this action and each of them be required to answer herein and set up the nature and extent of their respective claimed interest in and to the said real property, and that upon the final hearing, such claimed interest be adjudged junior and inferior to the title of these intervenors and that the full, legal and equitable title in and to all of the said real property be quieted and confirmed in these intervenors and against all of the other parties herein, and that each of the other parties herein be forever barred and enjoined from claiming or asserting any right, title, interest, lien, estate or equity in and to the said real property, or any part thereof, adverse or hostile to these intervenors. . . ."

The trial court's pre-trial order recited that one of the issues common to all of the cases which had been filed involving the Arkansas River was:

". . . the ownership of the bed of the Arkansas river below the confluence with the Grand River."

In the first judgment entered in this case this court adjudicated:

> "... that against the Cherokee Nation and the Choctaw and Chickasaw Nations, now claiming ownership thereof as unalloted lands of their western domains, the title of the State of Oklahoma, and of all defendants herein claiming an interest through the State, is quieted and said tribes are barred and enjoined from asserting ownership or other claims adverse to said defendants; and that said Indian tribes have no right or interest in any money or other proceeds realized or which may be realized by the State of Oklahoma or the other defendants from the lease or rental or other use of said lands."

When this cause was first before the Circuit Court of Appeals the State in its brief posed what it considered to be the single issue in the case: [3]

> "In the treaties with the Cherokees and the Choctaws and the patents authorized by the treaties, did the United States definitely and plainly express an intention to convey the river bed of the Arkansas River below its confluence with the Grand River to the Cherokees or the Choctaws?"

In pursuance of what it stated to the Circuit Court of Appeals to be the single issue in the case the State said further in its brief: [4]

> "It is the position of the Appellees that the United States, consistent with its public policy declared many times with respect to the territories which it held and from which future states were later formed, did not in its treaties or patents with or to the Cherokees or

[3] To be found at page 2 of its answer brief.

[4] To be found at page 3 of its answer brief.

the Choctaws definitely declare or otherwise make very plain an intention to convey the navigable portion of the Arkansas river bed here involved to the Cherokees or the Choctaws. Therefore, the river bed was not granted to the Cherokees or the Choctaws and remained vested in the United States. It became the property of Oklahoma when the State was created."

In the "Summary and Conclusion" to its brief to the Circuit Court of Appeals the State said: [5]

"In our argument we have demonstrated that:

"1. The State of Oklahoma acquired title to the bed of the navigable portions of the Arkansas River when it became a state.

"2. Neither the treaties nor the patents provide for the conveyance of the Arkansas river bed to the Cherokees or to the Choctaws.

"3. In the United States consistently since independence streams navigable in fact have been navigable in law.

"The United States acquired Oklahoma as a part of the Louisiana Purchase in 1803, and with respect to Oklahoma has consistently maintained its general policy of retaining title to the navigable river beds for the benefit of the future states. When Oklahoma was admitted as a state it was admitted on an equal footing with the original states and acquired title to the Arkansas river bed between its confluence with the Grand River and the state line of Arkansas. The United States did not convey this portion of the Arkansas river bed to the Cherokees or to the Choctaws in the treaties with them or the patents to them. Since there was no plain and definite conveyance to either of them,

[5] To be found at page 45 of its brief.

there was no reason for the United States to reserve the river bed. It was not necessary to reserve something that the United States already owned and had not conveyed. The fact that the river ran through lands conveyed to the Cherokees and lay between the lands conveyed to the Cherokees and the Choctaws was not material in view of the fact that the United States did not definitely and expressly convey it to either of them.

"The judgment of the trial court should be affirmed."

In its first opinion in this case the Circuit Court of Appeals commenced its opinion with this sentence: [6]

"This controversy concerns the ownership of the bed of the Arkansas River and the Oklahoma-Arkansas boundary."

and in its second paragraph the Circuit Court of Appeals said:

"The Cherokees sued Oklahoma and the holders of various sand, gravel, oil, and gas leases granted by Oklahoma and covering parts of the land in dispute. The relief sought was an accounting and an injunction. Oklahoma and various of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert their claims of ownership to a portion of the riverbed."

In its opinion the Circuit Court further said: [7]

"Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to make such divestiture.

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[6] The *Cherokee Nation* v. *Oklahoma*, 402 F.2d 739, 741, 742.

[7] First paragraph, second column, 402 F.2d 739, 745.

Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent 'very plain.'"

Rule 40 of the Rules of this Court provides:

"1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

* * * * * *

"(d) (1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. *The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.* (Emphasis supplied.)

"(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. *Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.* (Emphasis supplied.)

* * * * * *

"3. The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, and except that items (a), (b), (c) and (d) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side."

The State was not satisfied with the statements of the questions presented by the Cherokee Nation and the Choc-

taw and Chickasaw Nations in their brief to this Court. So, pursuant to Section 3 of Rule 40 it stated what it considered to be the real question for review, saying: [8]

> "Respondents controvert the statement of the 'Questions Presented' in the Brief of the Cherokees and the statement of the 'Questions Presented for Review' in the Brief of the Choctaws, and the statement of the 'Question Presented' in the Brief for the United States as Amicus Curiae, on the ground that each of those statements ignores *the real question which Respondents submit is this*: (Emphasis supplied.)
>
> 'In the treaties with the Cherokees and the Choctaws, and in the patents authorized by the treaties did the United States definitely and plainly express an intention to convey the river bed of the navigable Arkansas River in Oklahoma below its confluence with the Grand River?' "

In the first sentence of its *"Preliminary Statement"* in its brief to this Court, the State said: [9]

> "The question to be resolved is simple and direct. Did the United States convey or agree to convey the river bed to the Cherokees or the Choctaws?"

And continuing in its *"Preliminary Statement"* the State of Oklahoma said: [10]

> "To avoid the stark criterion which we have stated above, Petitioners have presented a voluminous and irrelevant mass of data which should not becloud the

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[8] To be found at pages 2 and 3 of the State of Oklahoma's brief to this Court.

[9] To be found at page 9 of the State of Oklahoma's brief to this Court.

[10] To be found at page 10 of the State of Oklahoma's brief to this Court.

only question that need concern this Court: Did the United States agree to convey or convey the river bed?"

Concluding the *"Preliminary Statement"* in its brief to this Court the State said:[11]

"In Section I of our Argument we will demonstrate the basis of Oklahoma's title to the navigable river bed.

"In Section II we will demonstrate that in the treaties and patents and attendant circumstances there is no evidence of an intention to convey the bed of the navigable river to either of Petitioners.

"In Section III we will demonstrate that at the time of the treaties there were specific and compelling reasons for retention by the United States of title to the navigable portion of the Arkansas River bed, apart from policies common to all navigable waters.

"In Section IV we will demonstrate that the provisions in the treaties that the lands ceded to each of Petitioners would not, without their consent, be included within the limits of any Territory or State, were not inconsistent with the policies, powers and rights of the United States to form a State from an area which included the lands ceded to the Petitioners."

In Section I of the State's brief in which it said in its *"Preliminary Statement"* it would demonstrate the basis of its title to the river bed is opened by the topical heading set in upper case bold face type:[12]

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[11]To be found at page 10 and at page 11 of the State of Oklahoma's brief to this Court.

[12]To be found at page 11 of the State's brief to this Court.

"THE STATE OF OKLAHOMA ACQUIRED TITLE TO THE BED OF THE NAVIGABLE PORTIONS OF THE ARKANSAS RIVER WHEN IT BECAME A STATE."

Arguing this proposition the State said: [13]

> "Promptly upon achieving statehood, Oklahoma became vested with the title to the river bed of the Arkansas river under its navigable portions located below high water mark."

In its concluding paragraph of its argument of this proposition the State said: [14]

> "Under the facts of this case, the State of Oklahoma acquired title to the bed of the navigable portions of the Arkansas River when it was admitted as a State on an equal footing basis. *No conveyance by the United States of the navigable portion of the Arkansas River bed had been made previous to Oklahoma statehood.*"

In the two concluding sentences in its brief to this Court the State of Oklahoma said: [15]

> "Moreover, prior to admission of Oklahoma as a State, the United States secured the consent of Petitioners to relinquishment of tribal ownership of the lands and to allotment of the lands to the individual tribal members and to the United States Citizenship for the tribal members. As citizens they voted on the question of admission of Oklahoma to the Union."

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[13]To be found at page 22 of the State's brief to this Court.

N.B. The State continues its argument of that proposition from page 22 through page 41 of its brief.

[14]To be found at page 41 of the State's brief to this Court.

[15]To be found at page 94 of the State of Oklahoma's brief to this Court.

In the first paragraph of its opinion in this case this Court said:

> ". . . As a practical matter what is at stake is the ownership of the minerals beneath the bed and of the dry land created by navigation projects that are narrowing and deepening the river channel."

And in the second paragraph:

> ". . . In its complaint, the Cherokee Nation sought both to recover the royalties derived from the leases and to prevent future interference with its property rights, claiming that it had been since 1835 the absolute fee owner. . . . Subsequently, petitioners, Choctaw and Chickasaw Nations sought and were granted leave to intervene in the case in order to present their claims that part of the river bed belongs to them" (page 617, L.Ed.2d).

These are the grounds upon which the State sought a rehearing:

"I. The majority here overlooked the critical distinction between the law governing navigable water beds and the law governing non-navigable beds. The decision in Brewer-Elliott upon which the majority opinion placed heavy reliance patently was not based on 'essentially similar' facts—and the Court there expressly refused to pass upon the questions presented here.

"II. The majority's conclusion that 'The United States can dispose of lands underlying navigable waters just as it can dispose of other public lands' is contrary to and overrules Shively v. Bowlby, 152 U.S. 1, 38 L.ed. 31, (1893), and all other pertinent previous and subsequent decisions. Its effect is to

reduce the sovereign State of Oklahoma to an unequal and inferior status in relation to her forty-nine sister states.

"III. The majority's holding as to title to the river bed is completely in conflict with its own finding as shown in the following quotation from its opinion: 'Turning then to that question, we think it clear, as did the Court of Appeals, that the parties to the treaties and patents did not pause specifically to provide for the ownership of the river bed.'

"IV. The good intentions of those joining in the majority opinion will not be served by the results of that opinion."

If the State felt that the abstractions now urged by it were "substantial grounds . . . although not previously presented . . .", it was required by Rule 58 to ". . . briefly and succinctly state" them.

The single contention of the State was that it became the owner of the river bed when it was admitted to the Union. Under Rule 40 the question of whether Oklahoma acquired title to the bed of the river when it became a State was deemed by the Supreme Court ". . . to include every subsidiary qustion fairly comprised therein." The State posited its claim of ownership upon the basic proposition that the United States owned the bed of the river at the time of statehood. The question: "Did the United States own the river bed when Oklahoma became a state?" "'. . . fairly comprised . . .' the '. . . subsidiary question(s). . . .'" (1) Had the United States in its treaties ceded the river bed to the Indian tribes in their "sovereign capacity" (as defined by the State), and (2) if so, had the "sovereign capacity" of the Indian tribes (as defined by the State)

eroded away so that the ownership of the river bed had become re-invested in the United States? and (3) was the bed of the river owned by riparian allottees at the time of statehood?

If the title to the river bed passed by the treaties to the Indian tribes then how it became re-invested in the United States must necessarily have been a ". . . subsidiary question . . ." that had to be gotten out of the way as an incident to establishing the ownership of the United States. Likewise, if the State claimed by prescription against riparian allottees then how the riparian allottees became owners of the river bed was also a ". . . subsidiary question . . ." that had to be gotten out of the way. The abstractions now advanced by the State were subsidiaries to the issue upon which it posited its claim of ownership. But, even if it were not so, the State did not present any of those abstractions to the Supreme Court when it had the opportunity and was required to do so under Rule 40 and Rule 58 and they must now be disregarded.

The logic of Rule 40 and Rule 58 of this Court is compelling and needs no defense. To the end that judicial procedure may be orderly, those rules restrain chameleonic adventures and prevent appeals by piecemeal. They say with all of the finality with which this Court can speak that questions which might have been raised on the former appeal but were not then urged are deemed to be waived. And singly or in combination they reflect the universal rule that on remand the Court will not consider matters appearing in the original record which might have been corrected on the first hearing but were not urged.

Mr. Justice Harlan, delivering the opinion of the Court in *Illinois, ex rel. Hunt* v. *Illinois C. R. Company*, 184 U.S. 78, 92, 46 L.Ed. 441, 447, quoting from *Roberts* v. *Cooper*, 20 How. 467, 481, 15 L.Ed. 969, 973, said:

> "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its member . . . we can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial. To the same effect are numerous cases, some of which are cited in the margin."

In *United States* v. *Camou*, 184 U.S. 572, 574, 46 L.Ed. 694, 696, the Court speaking through Mr. Justice Shiras referred to *Illinois, ex rel. Hunt* v. *Illinois C. R. Company* and repeated the cited language. Further citations from the almost endless number of decisions out of which Rule 40 was germinated would unecessarily burden the Court and we will restrain ourselves from doing so.

The Tenth Circuit in its opinion on the second appeal answered the State's argument:

> "Oklahoma and its lessees argue that the Supreme Court did not confirm present title to the river bed in the Indians but decided only that they received ownership under the grants and treaties of 1830 and 1835. Hence, they say that the question of present ownership is still open. We do not agree.

"Present ownership has been at stake since the inception of the suit. The Cherokees sued for an accounting for money received under the Oklahoma leases, for future rentals or royalties, and for an injunction against interference with the use of the bed. Without present ownership, they could not be entitled to the relief sought. Oklahoma and its lessees denied the claims of the Indians. The fact that the arguments in the court of appeals and in the Supreme Court centered around the construction and effect of grants and treaties did not remove the question of present ownership. Unless present ownership was at stake, the opinions of both the court of appeals and the Supreme Court were futile, academic exercises. If the Indians had divested themselves of ownership, a determination of past ownership was valueless so far as the presented issues were concerned. Without a claim of present ownership, there was no case or controversy within the meaning of Art. III, § 2, of the United States Constitution. Federal courts decide only cases and controversies. Muskrat v. United States, 219 U.S. 346, 361. The Supreme Court does not decide 'abstract, hypothetical or contingent questions.' Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 284.

"A fair reading of the opinions, majority, concurring, and dissenting, of the Supreme Court, requires the conclusion that the Supreme Court decided present ownership. See 397 U.S. at 621, 638-639, and 643."

Respectfully submitted,

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